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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

GEORGE CHRISTIAN CARR, Petitioner,

v.

UNITES STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the "additional duties" clause as contained within 28 *U.S.C.*, Section 636(b) (3) authorize a magistrate to preside over a read-back of testimony during a felony jury trial, without the consent of the parties?

2. Are the "additional duties" as referred to in 28 *U.S.C.*, Section 636(b)(3) the same as "subsidiary matters" which can be performed by a magistrate without the consent of the parties?

LIST OF PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains of the names of all interested parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, to wit:

GEORGE CHRISTIAN CARR, Petitioner, and **UNITED STATES OF AMERICA**, Respondent.

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GEORGE CHRISTIAN CARR, Petitioner,

v.

UNITES STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, GEORGE CHRISTIAN CARR, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 2, 1994.

OPINIONS BELOW

The March 2, 1994, decision of the

Court of Appeals for the Ninth Circuit is reported at 18 F.3d 738 (9th Cir. 1994) and is attached hereto in the Appendix to this Petition. A prior guilty verdict was rendered on June 1, 1992, by the jury in the unpublished case before the United States District Court for the Central District, Case No. CR 92-0236-LEW.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered March 2, 1994. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.*, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 *U.S.C*, Section 636, which is set forth verbatim in the Appendix, and more specifically concerns the interpretation of 28 *U.S.C*, Section

636(b)(3), which provides:

> "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

STATEMENT OF THE CASE

Petitioner, GEORGE CHRISTIAN CARR, was arrested on February 27, 1992, after law enforcement officials conducted a search of his home and found evidence which they believed linked him to three bank robberies.

A complaint was filed on February 28, 1992, and on March 20, 1992, a six count indictment was returned charging petitioner with three counts of armed robbery [18 *U.S.C.*, Sections 2113(a) & (d)] and three corresponding counts of use of a firearm in relation to a crime of

violence [18 *U.S.C.*, Section 924(c)(1)].

Petitioner's jury trial began on May 18, 1992, and testimony was heard over a five day period until May 28, 1992. On June 1, 1992, during jury deliberations, district court Judge Laughlin E. Waters was out of the state. On that date, the jury requested that the Government's key witness' testimony be read back to them. Judge Waters appointed and authorized Magistrate Stone to preside over the read-back, who asked the Government and petitioner if they objected. The Government responded that it did object and further added that it believed that there was a recent United States Supreme Court decision which prohibited the magistrate from presiding, unless there was consent by the parties. Petitioner also objected to the magistrate presiding over the read-back.

Overruling the objections of the parties, the magistrate proceeded with the read-back and a verdict of guilty on Counts 5 and 6 was thereafter returned by the jury that very day.

THE RULINGS BELOW

Over the objections of both the Government and defendant GEORGE CHRISTIAN CARR, the district court allowed a magistrate to preside over a read-back of the testimony of the Government's key witness.

In affirming the district court's judgment, and recognizing that there is no case directly on point, the Ninth Circuit based its analysis on grounds that the magistrate was not required to rule on any matter during the read-back, was not required to interact or communicate with the jury, and that the magistrate merely

presided as the read-back occurred. ***United States v. Carr***, 18 F.3d 738, 740 (9th Cir. 1994); APPENDIX 33 & 37. After reviewing just exactly what the magistrate did during the read-back, the Ninth Circuit concluded that because the magistrate's responsibilities are minimal during the read-back of testimony, a read-back of trial testimony in a felony jury trial is a "subsidiary matter" which a federal judge may properly assign to a magistrate. *Carr, supra,* at 740; APPENDIX 37.

REASONS FOR GRANTING THE WRIT

1.

CERTIORARI SHOULD BE GRANTED WHEN A UNITED STATES COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER CIRCUITS

Where many district court have been

reluctant to expand the role of magistrates because of the confusion over magistrates' constitutional and statutory authority, the Ninth Circuit has completely breached the barrier of uncertainty and has now ruled that a magistrate can preside during a felony jury trial, over the objections of the parties, just so long as the duties delegated to the magistrate are not objectively important and as long as the magistrate's actions do not result in prejudice to the defendant.

The holding of the Ninth Circuit in ***United States v. Carr***, 18 F.3d 738 (9th Cir. 1994) incorrectly interprets 28 ***U.S.C.***, Section 636(b)(3) and deviates from those established rules of law set down by this Court in ***Gomez v. United States***, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed2d 923 (1989) and ***Peretz v. United***

States, 501 U.S. ___, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991), and the holding of the Seventh Circuit in ***Olympia Hotels Corp. v. Johnson Wax Dev. Corp.***, 908 F.2d 1363 (7th Cir. 1990).

A. **QUESTION NUMBER 1: Does the "additional duties" clause as contained within 28 *U.S.C.*, Section 636(b) (3) authorize a magistrate to preside over a read-back of testimony during a felony jury trial, without the consent of the parties?**:

28 *U.S.C.*, Section 636 grants district courts authority to assign magistrates those specific duties delineated therein, as well as "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 *U.S.C.*, Section

636(b)(3). It is this "additional duties" clause that has been a source of confusion when an issue arises regarding the extend of authority that a federal judge may delegate to a magistrate when the task to be performed by the magistrate is not specifically identified in 28 *U.S.C.*, Section 636.

This Honorable Court in *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed2d 923 (1989) thoroughly analyzed the duties of federal magistrates and the scope of their authority under 28 *U.S.C.* 636(b)(3). Initially, this Court notes that a magistrate can be designated a special master in any civil case, hear and determine any pretrial matter (with the exception of certain dispositive matters), conduct evidentiary and other hearings, and recommend dispositions to the federal judge. *Id* at 868; 109 S.Ct at

2244. In defining those additional duties, a Committee Report listed the following criminal pretrial matters that a magistrate was authorized to handle: arrest warrants, search warrants, bail hearings, preliminary examinations, removal hearings, postindictment arraignments, pretrial conferences, and pretrial motions. *Id* at 868, fn. 16; 109 S.Ct at 2244. In 1979, Congress expanded the jurisdiction of the magistrate over both civil and criminal trials. Since 1979, magistrates have been authorized to preside at, and enter final judgments, in jury and non-jury civil trials, and misdemeanor bench trials. *Id* at 870; 109 S.Ct at 2245.

The Court in *Gomez*, was faced with the question of whether this grant of authority could be extended to felony criminal trials, and specifically

addressed the issue of whether a magistrate could preside during jury selection. This Court initially noted that a literal reading of the additional duties clause would tend to lead one to the conclusion that a magistrate could conduct any phase of a criminal trial. However, this Court concluded that the true intent of Congress was to withhold granting authority to preside over criminal felony trials.

> "But the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial. The legislative history, with its repeated statements that magistrates should handle

> subsidiary matters to enable district judges to concentrate on trying cases, and its assurances that magistrates' adjudicatory jurisdiction had been circumscribed in the interest of policy as well as constitutional constraints, confirms this inference."
>
> ***Gomez v. United States***, 490 U.S. 858, 872, 109 S.Ct. 2237, 2246, 104 L.Ed2d 923 (1989)

The Court in ***Gomez*** unanimously reversed the decision of a divided Second Circuit panel in ***United States v. Garcia***, 848 F.2d 1324 (2d Cir. 1988) and held that jury selection was not one of those additional duties which a federal judge could assign to a magistrate.

Even though 28 ***U.S.C.***, Section 636(a)(4) statutorily allows a magistrate

to preside at criminal misdemeanor trials, this authority is specifically limited to situations where the consent of all parties has been given. It has been argued and held that the Act's strict and explicit requirements of consent for referring misdemeanor trials to magistrates mandate that such consent must also be required to create jurisdiction in a felony case.

In *Peretz v. United States*, 501 U.S. ___, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991), this Court reviewed its decision in *Gomez* and stated that its holding was "narrow" and "carefully limited to the situation in which the parties had not acquiesced at trial to the Magistrate's role." *Peretz, supra*, at ___, 111 S.Ct. at 2664. By carefully reviewing the duties of a magistrate, along with the legislative history of 28 *U.S.C.*, Section

636, this Court held that jury selection, and all other critical stages of a trial, could be performed by a magistrate only with the consent of the litigants.

> "Our reading of the 'additional duties' clause will permit the courts, with the litigants' consent, to 'continue innovative experimentations' in the use of magistrates to improve the efficient administration of the courts' dockets. (Citation)
>
> At the same time, the requirement that a criminal defendant consent to the additional duty of jury selection protects a defendant's interest in requesting the presence of a judge at all critical stages of his felony trial.

> 'If a criminal defendant, together with his attorney, believes that the presence of a judge best serves his interests during the selection of the jury, then *Gomez* preserves his right to object to the use of a magistrate.'"
>
> ***Peretz v. U.S.***, 501 U.S. at ___, 111 S.Ct. at 2668

Peretz concludes that if a defendant at any time during his felony trial perceives of a threat of injury from the absence of an Article III judge, the defendant need only decline to consent to the magistrate's supervision to ensure that a judge conducts that portion of the

trial. *Peretz* at ___, 111 S.Ct. at 2668-2669.

The legislative history of 28 *U.S.C.*, Section 636 also emphasizes the crucial nature of the litigants' consent: "Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, only in cases where they are felt by all participants to be competent.". *Peretz* at ___, fn. 8, 111 S.Ct. at 2666

B. <u>QUESTION NUMBER 2: Are the "additional duties" as referred to in 28 *U.S.C.*, Section 636(b)(3) the same as "subsidiary matters" which can be performed by a magistrate without the consent of the parties?</u>:

Aside from analyzing the issues

before it based on grounds that nothing prejudicial occurred during the read-back[1], the Ninth Circuit incorrectly held that "the critical issue for us is whether a magistrate judge's presiding over a read-back of trial testimony is a 'subsidiary matter' in a felony jury trial". ***United States v. Carr***, 18 F.3d 738, 740 (9th Cir. 1994); APPENDIX 36. In an obvious display of interpretative gymnastics, the Ninth Circuit takes language out of context from 28 ***U.S.C.***, Section 636(b)(3) and ***Gomez v. United States***, 490 U.S. 858, 874-875, 109 S.Ct.

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[1] If accepted by this Honorable Court for review, Petitioner's Brief will discuss the Ninth Circuit's compounded error of applying the harmless error rule to the facts of this case, all in clear violation of the holding in ***Gomez v. United States***, 490 U.S. 858, 876, 109 S.Ct. 2237, 2248, 104 L.Ed.2d 923 (1989) that the "harmless-error analysis does not apply in a felony case" where a magistrate exceeds his or her jurisdiction.

2237, 2247, 104 L.Ed2d 923 (1989) and concludes that "[t]hough these additional duties are not defined, it is clear that Congress intended to restrict magistrate judges to 'subsidiary matters' in felony cases." *Carr, supra*, at 740; APPENDIX 35-36. A concise reading of 28 *U.S.C.*, Section 636(b)(3) and *Gomez* clearly establishes that the interpretation of the Ninth Circuit is contrived and tortured.

Although the legislative history of the Federal Magistrates Act is replete with statements that magistrates should handle subsidiary matters, the reason for this is "to allow district judges to concentrate on trying cases". *Gomez* at 872; 109 S.Ct. at 2246. The "subsidiary matters" referred to and specifically delineated throughout 28 *U.S.C.*, Section 636 are different from those "additional duties" referred to by 28 *U.S.C.*, Section

636(b)(3). No consent is needed for the exercise of "subsidiary matters", which can be performed by a magistrate even over the objection of the parties. [See, generally, 28 *U.S.C.*, Section 636 and 28 *C.F.R.*, Section 52.02[2]]. Thus, the Ninth Circuit's analysis should have centered on the issue of whether a magistrate judge's presiding over a read-back of trial testimony is an "additional duty", not

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[2] 28 *C.F.R.*, Section 52.02 states in relevant part: "(a) A judge of the district court without the parties' consent, may designate a magistrate to hear and determine criminal pretrial matters pending before the court, except for two classes of motions; as to the latter, the magistrate may conduct a hearing and recommend a decision to the judge. 28 *U.S.C.* 636(b)(1)(A).

(b) When specially designated by the court to exercise such jurisdiction, a magistrate may try, and impose sentence for, any misdemeanor if he has properly and fully advised the defendant that he has a right to elect 'trial, judgment, and sentencing by a judge of the district court . . ., and has obtained the defendant's written consent to be tried by the magistrate."

whether it is a "subsidiary matter".

After trial commences, there is little that could be classified as subsidiary. All subsidiary matters are dealt with during the pre-trial and post-trial proceedings. The "additional duties" referred to by 28 ***U.S.C.***, Section 636(b)(3) arguably could be any task dealing with the trial, especially in light of the policy considerations set forth in the legislative history of Section 636(b)(3) to "continue innovative experimentations" [***Peretz v. United States***, 501 U.S. ___, 111 S.Ct. 2661, 2668, 115 L.Ed.2d 808 (1991)]. However, under ***Peretz***, these additional duties can only be performed by a magistrate <u>after consent has been given by the parties</u>. Although ***Gomez*** holds that jury selection is not an additional duty, clearly it becomes an additional duty once consent

has been given. [See, for example, ***Peretz, supra,*** at ___, 111 S.Ct at 2668 where the Court refers to jury selection as an additional duty, when consent has been granted.] With consent, any felony trial matter could be assigned to a magistrate under the additional duties clause.

Compounding its error, the Ninth Circuit exclusively relied on ***United States v. Demarrias***, 876 F.2d 674 (8th Cir. 1989), which is factually and legally different from this case. Even though the court in ***Demarrias*** did not have the benefit of the holdings in ***Gomez*** or ***Peretz***, the Ninth Circuit certainly did and should have analyzed ***Demarrias*** in light of the law established by ***Gomez*** and ***Peretz***.

The key issue in all "additional duties" cases, as well as in ***Demarrias***, is

whether there was consent by the parties to have the magistrate preside over a part of a felony trial. In *Demarrias* there was consent by both parties, and there is a strong indication that the judge himself obtained the permission of the parties before he left town and before he assigned a magistrate to continue in his stead.[3] In this case, both the Government and the defendant *CARR* objected to the magistrate, and questioned his authority to preside over the read-back. The delegation in *Demarrias* was authorized because the parties consented; the delegation in *CARR* was not authorized because all parties objected.

Petitioner *CARR* is entitled to have

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[3] "After the jury began deliberations, the district judge left the city, with the acquiescence of both parties, leaving the magistrate to accept the jury's verdict". *Demarrias* at 677.

an Article III judge preside over every critical state of his trial. ***Gomez v. United States***, 490 U.S. 858, 876, 109 S.Ct. 2237, 2248, 104 L.Ed2d 923 (1989); ***Peretz v. United States***, 501 U.S. ___, 111 S.Ct. 2661, 2665, 115 L.Ed.2d 808 (1991). Listening to testimony from a tape recording, as well as listening to the court reporter during a read-back of testimony, involves the important and necessary jury function of reviewing the evidence which has been held to be so important as to require the presence of the defendant. ***United States v. Kupau***, 781 F.2d 740, 743 (9th Cir. 1986). Even though a task assigned to a magistrate may be facially insignificant, the defendant's rights cannot be eliminated without his prior consent.

CONCLUSION

In *Gomez*, this Court held that "[t]he absence of a specific reference to [a read-back of testimony to the jury] in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function." *Gomez, supra*,, 490 U.S. at 875-876, 109 S.Ct. at 2247. Relying on precedent and legislative history, this Court emphasized that the additional duties clause is to be read according to Congress' intention that magistrates "handle subsidiary matters[,] [thereby] enabl[ing] district judges to concentrate on trying cases." *Id* at 872, 109 S.Ct. at 2245. *Gomez* concluded that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed

as an implicit withholding of the authority to preside at a felony trial". (Emphasis added) ***Gomez***, at 872; 109 S.Ct. at 2246. In support of this conclusion, the Seventh Circuit in ***Olympia Hotels Corp. v. Johnson Wax Dev. Corp.***, 908 F.2d 1363 (7th Cir. 1990) states when referring to the "additional duties" clause that "[t]he location of this provision in the middle of the statute rather than at the end makes us doubt that it was intended to be as comprehensive a catch-all as its words literally suggest. If it were, ***Gomez*** would have been decided differently, since section 636(b)(3) is not limited to civil cases." *Id* at 1368.

Viewing the judicial interpretation of 28 ***U.S.C.***, Section 636(b)(3), coupled with the denial by Congress to allow a magistrate to preside over felony trials, without the consent of the parties, it

follows that it was Congress' intention to deny magistrates the authority to preside over a read-back of testimony to the jury during the jury deliberation process, especially when both the Government and the defendant expressly objected.

In violating the rules of law established in ***Gomez*** and ***Peretz***, the Ninth Circuit has not only created confusion regarding the authority of magistrates, but has authored an opinion that will allow other Circuit Courts to sidestep the consent requirement during a felony trial.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be granted.

DATED: May 17, 1994

Respectfully submitted,

By: _____
VERNON C. JOLLEY
Attorney for Petitioner,
GEORGE CHRISTIAN CARR

APPENDIX A: UNITED STATES v. CARR

UNITED STATES of America,

Plaintiff-Appellee,

v.

GEORGE CHRISTIAN CARR,

Defendant-Appellant.

No. 93-50154

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 1, 1994.

Decided March 2, 1994.

Defendant was convicted in the United States District Court for the Central District of California, Laughlin E. Waters, J., of armed bank robbery and using firearm in committing violent crime. Defendant appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) presiding over read-back of trial testimony in felony

properly assign to magistrate judge, and (2) denial of motion for acquittal was not final, appealable decision, even after hung jury mistrial.

Affirmed.

1. **United States Magistrates "Keynote" 21**

Congress intended to restrict magistrate judges to subsidiary matters in felony cases.

28 U.S.C.A., Section 636(a)(3), (b)(3).

2. **United States Magistrates "Keynote" 21**

Presiding over a read-back of trial testimony in felony jury trial is subsidiary matter which federal judge may properly assign to magistrate judge. 28 U.S.C.A., Section 636(a)(3), (b)(3).

3. **Criminal Law "Keynote" 1153(4)**

District court's imposition of restrictions on cross-examination is review for abuse of discretion.

4. **Criminal Law "Keynote" 662.7**

Cross-examination is effective under Sixth Amendment as long as jury receives sufficient information to appraise biases and motivations of witnesses. U.S.C.A. Const. Amend. 6.

5. **Criminal Law "Keynote" 1134(3)**

Issue of whether defendant was denied effective assistance of counsel is more appropriately addressed in habeas corpus proceeding than on appeal because it requires evidentiary inquiry beyond official record. U.S.C.A. Const.Amend. 6.

6. **Criminal Law "Keynote" 1023(3)**

Denial of motion for acquittal was not final, appealable decision even after hung jury mistrial. 28 U.S.C.A. Section 1291.

Vernon C. Jolley (Argued), Anaheim Hills, California, and Gerald V. Scotti (Briefed), Beverly Hills, California, for

the defendant-appellant.

Sally L. Meloch, Assistant United States Attorney, Los Angeles, California, for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: TANG, PREGERSON, and NOONAN, Circuit Judges.

PREGERSON, Circuit Judge.

OPINION

PREGERSON, Circuit Judge:

OVERVIEW

Appellant, George Christian Carr, was convicted of one count of armed bank robbery under 18 U.S.C., Section 2113(a) & (d), and one count of using a firearm in committing a violent crime under 18 U.S.C.

Section 924(c)(1). He received a total sentence of 106 months. The primary issue on appeal is on whether, over a defendant's objection, a federal magistrate judge has jurisdiction to preside over a court reporter's read-back to a jury of trial testimony in a felony trial. Appellant raises three additional issues, all of which lack merit: (1) whether the district court's decision to limit cross-examination of a key prosecution witness deprived appellant of his rights under the Confrontation Clause of the United States Constitution; (2) whether appellant was deprived of his Sixth Amendment right to effective assistance of counsel; and (3) whether the district court erred in it's decision to deny a Rule 29 motion to dismiss the remaining deadlock counts for insufficient evidence.

BACKGROUND

Three bank robberies occurred from December 1991 through February 1992 in Orange County, California. Following the third robbery, Ernest Barragan, a bank employee, witnessed the robber enter a tan, four door Mercedes Benz, bearing license number"1NPW813." Police traced the license number to a car owned by appellant's wife.

At trial, witness Barragan testified that the car had the same license plate as the get-away-car used at the third robbery. Barragan testified that he initially noted the incorrect number by transposing "1NPW813" into "1NPW183." Although the district court limited some of Appellant's cross-examination of Barragan, defense counsel successfully inquired about the circumstances

surrounding Barragan's change of recollection.

During deliberations, the jury requested a read-back of Barragan's testimony. The judge agreed but was unavailable to preside, so he appointed a federal magistrate judge to preside while the court reporter read back Barragan's testimony. The appellant objected to the courts decision to allow the magistrate judge to preside over the read-back. Nonetheless, the read-back proceeded with the magistrate judge presiding. The record reflects that the magistrate judge was not required to rule on any matter during the read-back.

The jury convicted the appellant for the third bank robbery and for one count of using a deadly weapon in the commission of a violent crime, but deadlocked on the remaining counts. The appellant made

timely motions for a judgment of acquittal and for a new trial. Both motives were denied. The government's subsequent motion to dismiss the remaining counts without prejudice was granted.

We have jurisdiction over this appeal under 28 U.S.C Section 1291. We AFFIRM.

ANALYSIS

I. Jurisdiction of Federal Magistrate Judges

Appellant contends that the district court erred by allowing the federal magistrate judge, over appellant's objection, to preside over the court reporter's read-back of trial testimony to a jury in a felony trial. Appellant argues that a magistrate judge lacks jurisdiction to preside over a read-back of testimony to a jury in a felony trial.

This is a question of law subject to *de novo* review, *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

[1] The jurisdiction of magistrate judges is governed by the Federal Magistrates Act. 28 U.S.C. S 636. Subsection (a)(3) of the Act authorizes magistrate judges to preside over federal misdemeanor trials provided that the defendant consents. *Gomez v. United States*, 490 U.S. 858, 871 (1989) (*interpreting* 18 U.S.C. Section 3401(b)). In addition, subsection (b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitutional and the laws of the United States." Though these additional duties are not defined, it is clear that Congress intended to restrict

magistrate judges to "subsidiary matters" in felony cases. *Gomez*, 490 U.S. at 872-73. Thus, the critical issue for us is whether a magistrate judge's presiding over a read-back of trial testimony is a "subsidiary matter" in a felony jury trial.

Though no case is directly on point, authority exists to suggest that the read-back of trial testimony falls within the parameters of subsidiary matters. For example, in *United States v. Demarrias*, 876 F.2d 674 (8th Cir. 1989), the Eighth Circuit held that a magistrate judge under the direction of a district judge had jurisdiction to preside over jury deliberations and accept a verdict, even though this responsibility required the magistrate judge to accept the jury's questions, communicate them to the absent judge, and communicate the judge's

responses to the jury. *Id.* at 677. The court reasoned that the tasks assigned to the magistrate judge by the district judge fell within the ambit of a subsidiary matter. *Id.*

[2] The magistrate judge here had even less responsibility. He was not required to interact or communicate with the jury. He merely presided as the read-back occurred. Therefore, we hold that presiding over the read-back of trial testimony in a felony jury trial is a subsidiary matter which a federal judge may properly assign to a magistrate judge.

II. Remaining Issues

[3] Appellant argues that the district court improperly restricted appellant's cross-examination of witness Barragan. A trial court's imposition of

restrictions on cross-examination is reviewed for abuse of discretion. *United States v. Perkins*, 937 F.2d 1397, 1405 (9th Cir. 1991).

[4] Cross-examination is effective under the Sixth Amendment "as long as the jury receives sufficient information to appraise the biases and motivations of the witness." *United States v. Feldman*, 788 F.2d 544, 554 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987). The few limits placed by the district court in the present case did not deprive the jury of its ability to appraise "the biases and motivations of the witness."

[5] Appellant also contends that he lacked effective assistance of counsel. This issue is more appropriately addressed in a habeas corpus proceeding because it

requires an evidentiary inquiry beyond the official record. *United States v. Daly*, 974 F.2d 1215, 1218 (9th Cir. 1992) (*citing United States v. Laughlin*, 618 F.2d 68, 70 (9th Cir. 1991)).

[6] Appellant finally argues that the district court erred by not granting his motion to dismiss for insufficiency of the evidence counts one through four over which the jury deadlocked. Our jurisdiction is limited to those matters in which a final decision of a district court has been entered. 28 U.S.C. Section 1291. The denial of a motion for acquittal is not a final, appealable decision even after a hung jury mistrial. *See United States v. Sehnal*, 930 F.2d 1420, 1424 (9th Cir. 1991) (*citing United States v. Carnes*, 618 F.2d 68, 70 (9th Cir. 1980)). We therefore lack

jurisdiction to entertain the merits of this claim.

AFFIRMED.

APPENDIX B: 28 *U.S.C.*, SECTION 636

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment --

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and

subject to the limitations of that section; and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary --

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A

judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court

and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure

for the Untied States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provision of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary --

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may

conduct any or all proceedings in a jury or nonjury civil matter and order entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial counsel or the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the

concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of

court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate Unites States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules

of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district court under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section

shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent

document; (4) refusal to appear after having been subpenaed or, upon oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to

warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by

reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall

have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such distinct is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such

section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 361.

(2)

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No. 93-2012

In the Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE CHRISTIAN CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Magistrates Act authorized a district judge to assign a magistrate judge to preside while a court reporter read back trial testimony to the jury during jury deliberations.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-40) is reported at 18 F.3d 738.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1994. The petition for a writ of certiorari was filed on May 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). He was sentenced to 106 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 27-40.

1. On February 24, 1992, at approximately 2:30 p.m., petitioner entered the Great Western Bank at 5392 Walnut Avenue in Irvine, California. He was wearing a Ronald Reagan mask, and he carried a handgun and what appeared to be a hand grenade. Petitioner raised the grenade and said, "This is a hold up. Don't push any buttons. I have a hand grenade." He then took $15,950 from three tellers and left the bank. Petitioner drove away from the bank in an automobile registered to his wife. Gov't C.A. Br. 3-6.[1]

2. During deliberations at petitioner's trial, the jury requested that the testimony of Ernest Barragan be read back to it. Barragan had testified that he observed petitioner leave the bank in a Mercedes Benz bearing a license plate registered to petitioner's wife. Pet. App. 32-33; Gov't C.A. Br. 5, 17. At the time that the jury made the request, the district judge who presided over petitioner's trial had traveled to the District of Alaska to preside over another case. After learning of the jury's request by telephone, the district judge decided to allow the reading of the testimony. Gov't C.A. Br. 17; 6/1/92

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[1] Petitioner also was charged with the robberies of the Orange County National Bank on December 23, 1991, and the Hawthorne Savings and Loan on December 3, 1991. The jury failed to reach a verdict on those counts. Gov't C.A. Br. 7-15.

Tr. 5-6. In an effort to find a judge to sit in on the reading of the testimony, the presiding judge's clerk contacted approximately nine other district judges in the Central District of California, but each was unavailable. 6/1/92 Tr. 7-8. The district judge then delegated the task to a federal magistrate judge pursuant to 28 U.S.C. 636(b)(3).

Petitioner objected solely on the basis of "uncertainty in the law about whether or not a magistrate can preside over this portion of the proceedings." 6/1/92 Tr. 9. Petitioner did not identify any possible prejudice resulting from the magistrate judge's presence during the reading of Barragan's testimony, nor did he identify any statutory or constitutional obstacle to the procedure independent of the Federal Magistrates Act itself. *Ibid.* The magistrate judge sat at the bench and observed while the court reporter read Barragan's testimony to the jury. The magistrate judge did not utter a word in the jury's presence and made no rulings. There is no indication in the record that the jury was aware that the person present was a magistrate judge rather than a federal district judge. Pet. App. 33; 6/1/92 Tr. 7.

3. The court of appeals affirmed. Pet. App. 27-40. It rejected petitioner's contention that the magistrate judge lacked jurisdiction to preside over the reading of the witness's testimony. *Id.* at 34-37. The court of appeals held that the district court had the authority to delegate that duty to the magistrate judge under 28 U.S.C. 636(b)(3), which provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The court held that, under *Gomez* v. *United States*, 490 U.S. 858 (1989), the magistrate judge's presiding over a court reporter's re-reading of trial testimony was the kind of "subsidiary matter" that falls

within the additional duties clause. Pet. App. 35-36. It noted that the magistrate judge "was not required to interact or communicate with the jury" and that he "merely presided as the read-back occurred." *Id.* at 37.

ARGUMENT

Petitioner contends that the district court erred in delegating to the magistrate judge the task of presiding while the transcript of one witness's testimony was read back to the jury. Pet. 6-26. This claim is without merit.

The authority to oversee the read-back of transcribed testimony is not expressly enumerated in the Federal Magistrates Act, but falls within the "additional duties" that a magistrate judge is authorized to perform under subsection (b)(3) of the Act, 28 U.S.C. 636(b)(3). The Act authorizes district courts to assign specified duties to magistrate judges. See 28 U.S.C. 636(a), (b)(1) and (2).[2] Magistrates may also "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3).

The availability of the district judge in this case to preside over another case in Alaska while the court reporter read back the witness's testimony to the jury in

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[2] For example, magistrate judges have all the powers of the United States Commissioners they replaced. 28 U.S.C. 636(a)(1). They also may impose conditions of release, and preside over misdemeanor trials. 28 U.S.C. 636(a)(2) and (3). Magistrate judges may hear and determine "any pretrial matter," with eight enumerated exceptions, and their pretrial orders, like those of a district judge, are subject to reversal only if "clearly erroneous or contrary to law." 28 U.S.C. 636(b)(1)(A). Magistrate judges are authorized to preside over the eight categories of pretrial matters excepted under subsection (b)(1)(A), such as motions to dismiss or quash indictments or informations or to suppress evidence, but must submit a report and recommendation for the presiding district judge's approval. 28 U.S.C. 636(b)(1)(B).

California under the auspices of the magistrate judge represents the kind of improved efficiency Congress sought to achieve by enacting the "additional duties" clause. Congress included the "additional duties" language in the original version of the statute, Pub. L. No. 90-578, § 101, 82 Stat. 1113, to allow district judges "to experiment with the assignment to magistrates of other functions in aid of the business of the courts, * * * [so that] there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal Courts." See S. Rep. No. 371, 90th Cong., 1st Sess. 26 (1967). In 1976, Congress amended the Act to clarify and further define magistrate judges' duties. Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729; see H.R. Rep. No. 1609, 94th Cong., 2d Sess. (1976); S. Rep. No. 625, 94th Cong., 2d Sess. (1976). The amendment placed the "additional duties" clause in a separate subsection to "emphasize[] that it is not restricted in any way by any other specific grant of authority to magistrates." H.R. Rep. No. 1609, *supra*, at 12. Both the House and Senate Reports on the 1976 amendment stressed that the purpose of subsection (b)(3) was to "enable[] the district courts to continue innovative experimentations in the use of this judicial officer." *Ibid.*; S. Rep. No. 625, *supra*, at 10. Among the examples of "additional duties" Congress referred to was the duty of "accept[ing] returns of jury verdicts where the trial judge is unavailable." H.R. Rep. No. 1609, *supra*, at 12. Authorizing a magistrate judge to supervise the read-back of recorded testimony, a task even less demanding of judicial skill and impartiality than receipt of a verdict, is thus just the type of subsidiary duty Congress

contemplated as falling within the "additional duties" clause.

Petitioner contends that under *Gomez* v. *United States*, 490 U.S. 858 (1989), and *Peretz* v. *United States*, 111 S. Ct. 2661 (1991), a district court is prohibited, absent the defendant's consent, from delegating any part of a felony trial, no matter how trivial, to a magistrate judge. Pet. 10-16. Those cases do not so hold. *Gomez* held that the task of conducting jury voir dire in a felony case is too important to delegate to a magistrate judge. 490 U.S. at 874-876. *Peretz* held that the prohibition announced in *Gomez* does not apply if the litigants consent. 111 S. Ct. at 2668-2669. The *Gomez* prohibition is not a blanket ban on magistrate judges' assisting at felony trial proceedings, but applies only to the "critical stages of a criminal trial." *Gomez*, 490 U.S. at 876; *Peretz*, 111 S. Ct. at 2665 (stating that *Gomez* applies to "every critical stage of a felony trial"). *Gomez* invalidated delegation of voir dire to a magistrate judge because voir dire "represents jurors' first introduction to the substantive factual and legal issues in a case," and the court must during voir dire conduct sensitive questioning of the jury venire and rule on the potential jurors' impartiality. *Gomez*, 490 U.S. at 874-875. No similar importance attached to the delegation challenged in this case.

The Ninth Circuit properly declined to extend *Gomez* to apply to the ministerial duty of presiding over the read-back of a trial witness's testimony. The re-reading of transcripts to the jury is not one of the "critical stages" of a felony trial. Unlike a judge's conduct of the voir dire in *Gomez*, a district judge's supervision of the reading back of testimony in this case could not conceivably have affected the outcome of the trial, nor does petitioner so contend. The magistrate judge's act of

observing the read-back required no decision to be made nor did it call for any exercise of judicial discretion. The district judge, not the magistrate judge, made the discretionary decision to allow the jury to hear the requested testimony, and the parties were in agreement that the entire testimony should be read. The magistrate judge's sole delegated duty was to sit in the courtroom and observe while the court reporter read the testimony to the jury. As the court of appeals noted, the magistrate judge "was not required to interact or communicate with the jury." Pet. App. 37. In fact, the district court could have provided the transcript of the witness's testimony to the jury to review in the jury room without the supervision of any judicial officer. While it was prudent for the district judge to provide official supervision for the reading aloud of the transcript, there is no reason to require that it be performed by an Article III judge.

The Ninth Circuit's decision does not conflict with any decision of any other federal court of appeals.[3] Other courts have held that magistrate judges may per-form duties that are as routine as those at issue here. See, *e.g.*, *United States* v. *Johnson*, 962 F.2d 1308, 1312 (8th Cir.), cert. denied, 113 S. Ct. 358 (1992), and 113 S. Ct. 1418 (1993) (holding that a magistrate judge was

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[3] Petitioner erroneously asserts that the decision of the court of appeals conflicts with *Olympia Hotels Corp.* v. *Johnson Wax Development Corp.*, 908 F.2d 1363 (7th Cir. 1990). Pet. 8, 25. In *Olympia Hotels*, the court of appeals applied *Gomez* in a civil case, holding that a district court may not assign a magistrate judge to conduct voir dire in a civil case over a party's objection. That holding rests on the notion that voir dire is also a critical stage of a civil case, and does not conflict with the decision below regarding the substantially less weighty task of overseeing the reading back of transcribed testimony.

authorized to accept the verdict in a felony case, because "the ministerial task of taking a verdict" is not "a critical stage of a trial" under *Gomez*); *United States* v. *Lee*, 943 F.2d 366, 369 (4th Cir. 1991) (holding that magistrate judge was authorized to ask voir dire questions prepared by district judge who was present but having voice trouble).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

[4] Other decisions in which the courts of appeals have relied on the absence of a defendant's objection to uphold delegation to a magistrate imply that, even had an objection been raised, the delegation could have been sustained under the "additional duties" clause. See, *e.g.*, *United States* v. *Arnoldt*, 947 F.2d 1120, 1124 (4th Cir. 1991) (commenting that "the delegation of authority to preside over the return of the [jury] verdict qualifies as an 'additional duty' under section 636(b)(3)"), cert. denied, 112 S. Ct. 1666 (1992); *Allen* v. *United States*, 921 F.2d 78, 80 (6th Cir.) (commenting that, where the district court prepared jury instructions and ruled on all objections, and "[t]he magistrate only performed the ministerial function of actually reading the final instructions to the jury," the magistrate's action was authorized), cert. denied, 111 S. Ct. 2896 (1991); *United States* v. *Demarrias*, 876 F.2d 674, 677 (8th Cir. 1989) (commenting that the magistrate judge acted within authorized "additional duties" in presiding over jury deliberations, relaying jury questions to district judge, communicating judge's responses to jury, and accepting verdict).